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IN THE

SUPREME COURT OF THE UNITED STATES

No. 2 [illegible]

BROWNDALE INTERNATIONAL LIMITED,
A Canadian Corporation,

Petitioner,

v.

BOARD OF ADJUSTMENT FOR THE COUNTY OF DANE, Consisting of MILLARD ERICKSON, OSCAR HOLTE and HARLAND DAHLK, and TOWN OF COTTAGE GROVE,

Respondents.

BRIEF OF RESPONDENT BOARD OF ADJUSTMENT FOR DANE COUNTY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a requirement that treatment facilities for emotionally disturbed children obtain an approval of site before being operated in a single family residence district, violate the equal protection clause of the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS STATUTES AND ORDINANCES INVOLVED

CASE OR CONTROVERSY CLAUSE U.S. CONSTITUTION, ARTICLE III, SECTION 2

The judicial power shall extend to all cases, in law and equity, arising under this constitution. . . .

ARGUMENT

Petitioner cites Euclid v. Ambler Realty Co., 272 U. S. 365 (1926) for the proposition that zoning ordinances, in order to be constitutionally valid, must satisfy the requirements of due process of law and equal protection of the laws as contained in the Fourteenth Amendment. Dane County concedes, indeed it joins in asserting, that very proposition. It is because of the very fact that it is the policy of the Board of Adjustment to treat substantially equal land uses equally that Petitioner is allegedly aggrieved. Respondent, Dane County, contends that the Petitioner is using an alleged violation of the equal protection rights of the emotionally disturbed children as a smokescreen behind which to hide that it is attempting, by this action, to obtain for itself treatment which is substantially unequal from that afforded other facilities for the treatment of illness which seek to locate in single family residence districts. For, as Sec. 10.12 (2) (c) of the Dane County Zoning Ordinance indicates, all other such facilities for the treatment of illness are required to have site approval in these single family residence districts.

Petitioner has asserted that there are three reasons why this Court ought to grant certiorari in this case. First, Petitioner contends that the decision reached by the Supreme Court of Wisconsin is in direct conflict with a recent decision of the Second Circuit Court of Appeals. That decision has also been appealed to this Court. Secondly, petitioner contends that the Supreme Court of Wisconsin erred in not treating an alleged separate classification of emotionally disturbed children as "suspect". And finally, Petitioner contends that the Supreme Court of Wisconsin has erroneously applied the "old equal protection" standard rather than a new standard, which has supposedly recently emerged, in arriving at its decision in this case.

The Respondent contends that there are three sound reasons why this Court ought not exercise its discretion to grant certiorari in this case: (1) Petitioner lacks standing to raise the particular equal protection argument it seeks to raise; (2) The decision below in this case is not even apparently in conflict with that of the Second Circuit; and (3) There has been no showing below of any classification in the Ordinance, or the way in which it is enforced, which is based upon the emotional disturbance of the children.

I

PETITIONER MAY NOT ASSERT THE CONSTITUTIONAL RIGHTS OF THE EMOTIONALLY DISTURBED CHILDREN

It is clear from the facts of this case that if Petitioner sought to show that its own equal protection rights were being infringed by the Zoning

Ordinance, it would not be successful in doing so. For, it is obvious that not only is Browndale forbidden by the Ordinance to operate treatment facilities for emotionally disturbed children within the single family residence district, but so are all others who may wish to do so. In order to overcome this difficulty, Petitioner instead asserts that it is the emotionally disturbed children who are being excluded from the zoning district in violation of their equal protection rights. Through this mental sleight of hand, petitioner not only seeks to make an argument which it could not make on its own behalf, but it also, by wrapping itself in the cloak of helplessness of an emotionally disturbed child, seeks to argue a "suspect" classification and thus entitle itself to the increased judicial solicitude due a discrete and insular minority.

This Court has consistently held, however, that constitutional rights are personal to the party protected and may not be asserted by another. See, for example, Alderman v. United States, 394 U.S. 165 (1969); McGowan v. Maryland, 366 U.S. 420 (1961); United States v. Raines, 363 U.S. 17 (1960); Rogers v. United States, 340 U.S. 367 (1951); and Hale v. Henkel, 201 U.S. 43 (1906). The rationale underlying this type of treatment in this type of case is not that the Court lacks the constitutional power under Article III, Section 2 of the Constitution of the United States, to decide the issue because no case or controversy is presented. Rather, the rationale goes to the merits of the case itself, i.e., if the plaintiff bringing the action has not been legally wronged, then he is not entitled to a remedy. It is, of course, true that the petitioner may actually suffer adverse consequences as a result of the alleged discrimination against the children in this

case but the mere existence of adverse consequences does not suffice to state a cause of action, there must be a legal wrong done to the party seeking relief. A party may be adversely affected by the introduction of a statement obtained from another in violation of the other's constitutional rights. He may be adversely affected by the introduction of evidence that was obtained through an illegal search of another's premises. He may be forced to lose business by an ordinance that requires Sunday closing in violation of another's religious freedoms. Yet, in each of these situations, this Court has held that the constitutional rights involved are personal to the individual and may not be asserted by another even when the other has suffered adverse consequences. The instant case falls clearly within that same rationale.

It might be argued that the Court has deviated from this policy in the recent case of Eisenstadt v. Baird, 405 U.S. 438 (1972). But, in deciding to hear that case, the Court clearly stated that it was creating an exception to the rule for that unique situation only. The reason for the decision to hear that constitutional challenge via a surrogate lay in the specific statutory scheme involved. The challenged law provided that it was a criminal act to provide contraceptives to unmarried persons but it was not similarily a criminal act for unmarried persons to receive or possess them. The Court noted that even though it was the unmarried persons who were being denied equal treatment, unless the provider was allowed to challenge the law's constitutionality, no one else would have an occasion to do so. The Court then concluded that it would make an exception in that particular case so that the issue might not go unheard.

In the present case, however, ample remedies are available to the parties whose rights are affected to challenge the Ordinance. For example, one need only refer to the case with which Petitioner alleges the decision below differs, Boraas v. Village of Belle Terre, 476 F. 2d 806 (2d Cir. 1973). There the excluded parties challenged the Zoning Ordinance in Federal Court on equal protection grounds and to this point have been successful. Wisconsin Courts too are receptive to such challenges to zoning restrictions. See Missionaries of LaSalette v. Whitefish Bay, 267 Wis. 609, 66 N.W. 2d 627 (1954).

There is, therefore, no need for the Court to make an exception to the rule that constitutional rights are personal in this case.

II

THE DECISION BELOW IS NOT INCONSISTENT WITH THE RECENT DECISION IN THE SECOND CIRCUIT

The Second Circuit Court of Appeals has held that a zoning ordinance requirement which limited the occupancy of dwellings in a single family residence district to not more than two unrelated persons deprived those persons who sought to reside in these districts, in groups of more than two unrelated persons, of the equal protection of the laws, Boraas v. Village of Belle Terre, 476 F. 2d 806 (2d Cir. 1973), U.S. Appeal Docketed, No. 191, 42 U.S.L.W. 3109. This case, its facts and its holding, is totally dissimilar to the holding below in this case. It is true, as alleged by Petitioner, that both cases involve a challenged

classification under a "single family" residence district. It is at this point, however, that any further similarity ceases.

The ordinance involved in Boraas limited the occupation to not more than two unrelated persons. The Ordinance in the instant case would permit up to five such unrelated persons to reside together. The importance of this difference becomes apparent when one realizes that underlying the Court's decision in Boraas was the fact that the limitation imposed on unrelated persons was more restrictive than the number of persons in the average size traditional family. The municipality had argued in Boraas that there was a rational basis for a limitation because traditional family size tends to be self-limiting while there was conceivably no limit to the number of unrelated persons who could reside together in the absence of some legal limitation. Thus, the municipality's legitimate interest in limiting population density served as the necessary rational basis for the classification. The Court did not reject this argument, but rather pointed out that if this was the objective, the statute was overly broad.

> ". . . For instance, if it (the Zoning Classification) were aimed at maintaining population density at the level of traditional family units, it would not limit the number of unrelated occupants to two (2) persons per one-family dwelling, which admittedly is smaller than the size of the average family. Assuming such a purpose, a more permissive ordinance would suffice." 476 F. 2d at 817.

Thus, the Court in Boraas did not decide the question of whether a limit which was greater than

the size of the average traditional family would be supportable under the equal protection clause. Five persons is greater than the size of a traditional family and a limit of four unrelated persons has been upheld as being within the state's police power, Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908 (N. D. Cal. 1970).

An even more important difference between the two cases than the statutory language, however, is that the decision in the instant case did not rest upon the five-person requirement. Rather, the Court below held that irrespective of the number of persons who are physically housed in the group homes, the use is not residential. It was, in fact, the Trial Court which based a distinction in treatment on the five-person limitation. It held that therapeutic homes of more than five children required site approval while those of five or less did not. (A. 47). The Wisconsin Supreme Court reversed holding that therapeutic homes are treatment facilities and not residential uses regardless of the number of children involved.

> ". . . The use of the premises is not even principally for residential living purposes. Rather, its primary use is to provide care and treatment for emotionally disturbed children. . . . The therapeutic home "arrangement" is substantially different than a group of priests, nurses, school teachers, students or others who acquire premises to use as a residence for a group. . . ." (A. 18-19)

It, thus, becomes clear that even if the five-unrelated-person requirement were to be invalidated, such a decision would not require a reversal of this

case. For the decision rests not on the number of persons who are cared for in the home, but upon the nature of the land use occasioned by the home itself. The question then becomes merely one of interpreting the meaning of the term "residential use" as used in the Zoning Ordinance -- hardly a question with which the Supreme Court of the United States ought to concern itself.

Since the decisions in the two cases are clearly not in conflict with each other, a granting of certiorari based on such conflict, as alleged by the Petitioner, would be clearly inappropriate.

III

THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT PETITIONER'S CONTENTION THAT THE ORDINANCE DISCRIMINATES AGAINST EMOTIONALLY DISTURBED CHILDREN

Petitioner has assumed, for the purpose of creating constitutional issue, a fact which is not supported in the record. Specifically, Petitioner has assumed that the classifications made were based on the traits of the persons who are housed in the therapeutic homes rather than on the nature of these homes themselves. The fact is, however, that the classifications were made on the differences of the homes and not on the differences of the children. The Court below emphasized this repeatedly in its opinion.

> ". . . These two types of homes have substantial differences that permit separate reasonable classifications. Therapeutic homes are not being denied equal protection

> of the law under the zoning ordinance." . . . (A. 22) (Emphasis added.)

In addition to the fact that the ruling of the Court below was not based on any differences related to the children, there is no support for an argument that the Ordinance is intended to relegate emotionally disturbed children to a separate class for residential purposes. Petitioner has revealed no section of the Ordinance, nor was the Respondent able to discern such a section, which would limit the right of an emotionally disturbed child to reside in a single-family residence district in a setting other than a treatment facility. Moreover, in addition to the therapeutic homes, many other types of treatment facilities require site approval. Sec. 10.12 (2) (c) of the Dane County Zoning Ordinance (1971) lists the following categories of treatment facilities which require an Approval of Site:

> (c) Hospitals, nursing homes, convalescent homes, extended care facilities, sanitariums and orphanages. . . .

Treatment facilities for emotionally disturbed children have, therefore, <u>not</u> been singled out for special treatment under the Ordinance. How then can the Court conclude that the emotionally disturbed children have been singled out for exclusion from the residential districts? Doesn't it make at least as much sense to conclude it is the operational character of these treatment facilities which are being regulated? If the Court were to conclude that these children have been discriminated against in this case, might it not also conclude that the Ordinance discriminates against the aged, the sick and the injured because site approval is required for

nursing homes, hospitals, and extended care facilities? Respondent contends that such a finding in this case would not only be totally unsupported on the record in this case, but absurd as well.

Because there is no evidence to support the assertion by Petitioner that the Ordinance discriminates against emotionally disturbed children, the contentions made under subheadings I and II in the Petition for Certiorari do not serve as a basis for this Court to grant certiorari.

CONCLUSION

For all of the above reasons, Respondent respectfully prays that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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